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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/800,792	03/07/2001	John C. Evans	GME-138/119	5511
26875	7590	01/14/2005	EXAMINER	
WOOD, HERRON & EVANS, LLP			WEINSTEIN, STEVEN L	
2700 CAREW TOWER			ART UNIT	PAPER NUMBER
441 VINE STREET				1761
CINCINNATI, OH 45202				

DATE MAILED: 01/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

CD

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/800,792	EVANS, JOHN C.	
	Examiner Steven L. Weinstein	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 30 September 2004.

2a) This action is **FINAL**.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-43 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-43 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____

Upon reconsideration, and in view of the remarks made in the communication received 9/30/04, the rejection of claims 1-43, under 35USC 112 first paragraph' is hereby withdrawn.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over San Francisco Examiner in view of www.beyondtherainbow2oz.com, further in view of Packing Week (2/99), the Atlanta Constitution (3/30/99), Golub (Russia '908), Forbes (11/8/93), Charlotte Observer (3/93), Seattle Times (12/30/93), Akron Beacon J. (11/i1/92), and Star Tribune (10/17/94), further in view of Newman ('787), Beall ('510) and Ruff ('463), for the reasons fully and clearly detailed in the Office action mailed 8/29/03 and 4/28/04.

All of applicant's remarks filed 9/30/04 have been fully and carefully considered but are not found to be convincing. It is urged that SanFrancisco Examiner does not teach placing the cotton candy in direct contact with the inner surface of the container. As discussed previously, the article states that cotton candy was sold wherein a puff of cotton candy was set in a plastic souvenir bucket. The article makes no mention of a bag. References must be taken for what they disclose. The article does not say that the puff of cotton candy was in a bag set in a bucket or a bagged puff of cotton candy was set in a bucket. The clear teaching is that the cotton candy, without a bag, was set in the bucket, and since no bag is mentioned, the cotton candy would be in direct contact with the bucket/container. Forbes, Akron Beacon J. and Star Tribune also refer to selling cotton in buckets and none of these references mention a bag. The preponderance of the

evidence, the specific wording, and common sense surely points to the fact that cotton candy was sold in buckets, without bags, and in direct contact with the container. The Office actions point out that even if the references had made a positive statement that bagged cotton candy was sold in the containers or applicant could somehow make a convincing showing that bags were involved in the container, the claims would still not be patentable since the art taken as a whole teaches it would have been obvious to place any food in a container without a bag and thus be directly in contact with the container walls (depending of course on the volume of the product relative to the volume of the container. Note too, that the citation of the two Court cases are not seen to be applicable to the current fact situation. The art taken as a whole does not teach a bag in the bucket, so there can be no question whether the cotton candy is in contact with the container. It clearly is. The amendment also briefly refers to Packaging Week, Atlanta Constitution, Golub, Newman, Beall and Ruff. However, the remarks point out what each discloses without addressing how they have been applied in the rejection set forth in the last several Office actions. For example, Packaging Week and the Atlanta Constitution have been applied as evidence to show the art was well aware of the importance of high barrier packaging for cotton candy; Golub has been applied as evidence that the art was well aware of the importance of avoiding compression of compressible cotton candy; and Newman, Beall and Ruff have been relied on as evidence that plastic containers and covers are of course, notoriously old and that product (even ones sensitive to abuse) are conventionally placed in containers in direct contact with container walls (i.e. without an inner bag).

The Declaration filed 9/30/04 under 37 CFR 1.132 by Kroeger has been fully and carefully considered but has not been found to be convincing and thus is insufficient to overcome

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the rejection of record of claims 1-43 under 35USC103. The Declaration compares plastic bags to cotton candy “packaged according to the present invention”. Neither packaging is otherwise described. Therefore, it is not clear what is the nature of the bag, both compositionally and thickness, nor is it clear that the container is that recited as to both the thickness and composition. Thus, the comparison does not give sufficient factual evidence. However, even more important is the fact that the facts presented are not germane to the rejection at issue. That is, the comparison compares a bag to a container but the rejection is not based on cotton candy in a bag. The rejection is based on a primary reference that has cotton candy in a container of similar type to that disclosed and claimed by applicant. Therefore, since applicant is clearly not the first to provide cotton candy in a container, which is clearly and unequivocally, taught by the art as being conventional, a comparison of a container to a bag is irrelevant. Also, the result would not be unexpected. The results would be expected. One of ordinary skill in the art would expect that a self supporting container would afford better protection to cotton candy, or any other damage prone product, than a flexible bag. Similarly, as pointed out previously, it is a well known fact that the thicker a given plastic, the more impermeable it becomes. This is a basic rule of mass transfer. Thus, the problems attributed to cotton candy e.g. fragility, sensitivity to permeable containers, etc are not exclusive to cotton candy and have been dealt with by the art taken as a whole.

The Declaration also appears to be attempting to make a commercial success showing, but a statement that “on information and belief” an unnamed company ‘expects’ to sell a certain number of containers next year is not seen to be sufficient evidence of commercial success. The

evidence is not a fact nor does it compare the container to sales of cotton candy in bags or any nexus between the potential sales in containers to the claimed invention.

One final point concerns the urged stuffing of the cotton candy in bags with the cotton candy being “prone” to damage. Since the Office action is based on there either being no bag in the container or that even if there was a bag (and whatever function it might have in an outer container which appears to be inexplicable), that it would have been obvious to remove the bag and its function, the urging of damage is therefore irrelevant. Note, too, that if the bag is large enough, including a wide mouth as wide as the container, there should be no damage, in the step of placing the cotton candy in the bag and no more damage than if one placed the cotton candy directly in the container.

Lastly, the Declaration lists 17 companies that are offering cotton candy packaged in a container. The Declarant states that to the best of his knowledge, these products were introduced only after “Candee Fluff”, which is stated to be the present invention, was observed in the market place. The USPTO has no convenient way to verify when these seventeen products were introduced in the market or when they were first made public. What data is applicant using to come to this conclusion and when was applicant’s invention first made public?

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L Weinstein whose telephone number is (571) 272-1410. The examiner can normally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

S. Weinstein/af  
January 7, 2005

*Steven Weinstein*  
STEVE WEINSTEIN  
PRIMARY EXAMINER 1761